UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SUNSET FINANCIAL RESOURCES, INC. Plaintiff, v. REDEVELOPMENT GROUP V, LLC, et al., Defendants.	HON. JEROME B. SIMANDLE Civil Action Nos. 05-2914 and 05-2915 **OPINION**

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SIMANDLE, District Judge:

This matter is before the Court on two motions to dismiss filed by Defendants Flynn Appraisal Associates, Inc. ("Flynn Appraisal") and Brian Flynn ("Flynn").[1] Specifically, the Flynn Defendants move to dismiss certain counts and to strike Brian Flynn as a defendant in certain counts in the First Amended Complaint ("FAC") filed by Plaintiff Sunset Financial Resources, Inc. ("Plaintiff"). Second, both Flynn Appraisal and Flynn move to dismiss certain counts of Defendants Dawn Staley and Redevelopment Group V, LLC's First Amended Answer and Cross-Claims (the "FAA"). The claims against Flynn Appraisal and Flynn stem from an allegedly faulty appraisal, issued by Flynn Appraisal, on an athletic facility in Voorhees, New Jersey. For the reasons expressed below, both of Flynn Appraisal and Flynn's motions to dismiss will be denied.

I. BACKGROUND

A. The Allegedly Fraudulent Transaction

Because the parties to this case are familiar with its underlying facts, the Court will include only a brief summary of the relevant facts. This case centers on an athletic facility known as "The Coliseum" in Voorhees, New Jersey, a 22-acre commercial sports facility, containing an ice rink, gym, indoor

[1] Flynn Appraisal and Brian Flynn will be known collectively as the "Flynn Defendants."

and outdoor swimming pool, fitness center, banquet facility and office space. (FAC ¶ 7.) Plaintiff originally brought this claim against two defendants (Redevelopment Group V, LLC and Dawn Staley)(the "Redevelopment Defendants") seeking to foreclose on a mortgage for the Coliseum and enforce a mortgage note.[2] The Redevelopment Defendants argue that they are not responsible for the debt because Plaintiff, an individual named Jay Phillips ("Phillips") and several others put into motion a scheme to defraud and wrongfully induce the Redevelopment Defendants to execute certain loan documents necessary for Phillips to acquire the Coliseum. (FAA ¶ 25-26.)

In order to induce the Redevelopment Defendants to purchase the mortgaged property, the Redevelopment Defendants claim that Plaintiff and other third-party defendants (Phillips, Steven Forman, Sunset Mortgage Company, L.P., and Sunset Commercial) grossly misrepresented the value of the Coliseum, allegedly telling Staley that the Coliseum was worth at least $9,000,000 and that Staley's investment would be secure because she would only be taking out a $4,700,000 mortgage on a property. (Id. ¶ 57.) Phillips also allegedly told Staley that the monthly income stream from the property's current lessees was greater than the monthly mortgage payments. (Id.) After Staley had signed the

[2] Plaintiff filed companion lawsuits. One suit is a foreclosure action (Docket No. 05-2914) and the other is an action to enforce a mortgage note (Docket No. 05-2915).

contract of sale, the Redevelopment Defendants claim that, on August 4, 2004, a closing occurred in Staley's absence. The Redevelopment Defendants claim that Staley's signature was forged on the pertinent loan and closing documents.

B. The Role of Flynn Appraisal Associates, Inc. and Brian Flynn

Brian Flynn is a licensed real estate appraiser working through his appraisal company Flynn Appraisal Associates, Inc. In connection with the transaction, Phillips and others allegedly induced Plaintiff to engage Flynn Appraisal to perform an appraisal of the Coliseum. (Id. ¶ 54-55.) According to the Redevelopment Defendants, Flynn Appraisal valued the Coliseum at over $9,000,000 but failed to conduct such basic due diligence such as investigating the validity of allegedly faked and forged leases or obtaining estoppel certificates for the current tenants of the Coliseum. (Id. ¶ 56, 59-60.) Plaintiff then engaged Boney & Johnson Appraisers ("Boney & Johnson") to provide an independent validation of Flynn Appraisal's appraisal. (Id. ¶ 63.) Boney & Johnson expressed concerns about the validity of the earlier appraisal but, according to the Redevelopment Defendants, Phillips and others induced Boney & Johnson to sign off on the earlier appraisal by making several alleged misrepresentations to them. (Id.)

C. This Court's February 24, 2006 Opinion and Order

Plaintiff filed companion actions in this case on April 8, 2005 in the Superior Court of New Jersey: (1) a foreclosure action against Redevelopment and (2) an action against both Redevelopment and Staley demanding payment of the overdue principle, interest, and late fees under the note. On June 6, 2005, both state court actions were removed to this Court. On July 17, 2005, the Redevelopment Defendants filed an Answer in the note action making a number of counterclaims and third-party claims against various third-party defendants. Third-party defendants Sunset Mortgage/Sunset Commercial and Flynn Appraisal filed motions to dismiss the Redevelopment Defendants' third-party complaint. Plaintiff then filed a motion to amend/correct its Complaint in order to add new parties and new claims (contained in Plaintiff's proposed First Amended Complaint ("FAC")) and the Redevelopment Defendants filed a cross-motion to amend its answer, cross-claims and counterclaims (contained in Defendants' First Amended Answer, Cross-claims, and Counterclaims ("FAA")).

In a February 24, 2006 Opinion and Order, this Court, inter alia, (1) granted Plaintiff's motion to amend and file its FAC and name the Flynn Defendants as direct defendants and (2) granted the Redevelopment Defendants' motion to amend its FAA to bring additional claims against the Flynn Defendants. Sunset

Financial Resources, Inc. v. Redevelopment Group V, LLC, 417 F. Supp.2d 632 D.N.J. 2006)("Sunset I"). The Court also denied the Flynn Defendants' motion to dismiss the original cross-claims brought by the Redevelopment Defendants.[3] (Id.)

D. New Claims in the FAC and FAA

At issue in this motion are five new claims asserted by Plaintiff against the Flynn Defendants in the FAC. They are as follows:

- Count 22: Plaintiff alleges that Flynn and Flynn Appraisal breached its contract with Plaintiff "to provide [P]laintiff with an accurate appraisal of the fair market value of the [Coliseum] . . . by providing an inaccurate, erroneous and inflated appraisal of the fair market value of the [Coliseum]." (FAC, Count 22 at ¶¶ 2, 3.);

- Count 23: Plaintiff alleges that Flynn and Flynn Appraisal was negligent and engaged in professional malpractice when they failed to provide an accurate appraisal and to confirm the authenticity of certain leases related to the Coliseum; (Id. at Count 23.)

- Count 24: Plaintiff alleges that Flynn breached his fiduciary duty to Plaintiff "by failing to properly and accurately appraise the fair market value of the Mortgaged Property." (Id. at Count 24, ¶ 3.);

- Count 25: Plaintiff alleges that Flynn and Flynn Appraisal negligently misrepresented the value of the Coliseum and the authenticity and value of certain leases. (Id. at Count 25, ¶ 5.); and

- Count 26: Plaintiff asserts a claim of "Tortious Interference with Economic Advantage," alleging that

[3] At oral argument, however, the Court confirmed that the Flynn Defendants had the right to file motions to dismiss any new claims brought against them in either the FAC or the FAA.

> Flynn and Flynn Appraisal "were negligent in making . . . false statements of fact or opinion" about the value of the Coliseum and the authenticity of certain leases. (Id. at Count 26, ¶ 3.)

Also at issue in this motion are two new claims against the Flynn Defendants raised in the Redevelopment Defendants' amended FAA. First, the FAA names Flynn individually in a negligent misrepresentation count. (FAA, Count 4.) Second, the FAA names Flynn individually in a negligence/malpractice claim. (FAA, Count 5.)

E. Procedural History

On April 11, 2006, the Flynn Defendants filed motions to dismiss (1) Counts 22 through 26 of Plaintiff's FAC [Docket Item No. 113] and (2) Counts 4 and 5 of the Redevelopment Defendants' FAA [Docket Item No. 114]. On April 21, 2006, Plaintiff and the Redevelopment Defendants filed opposition to the motions. [Docket Item Nos. 125, 126, respectively.] The Flynn Defendants did not reply and the Court did not hear oral argument on these motions. See Fed. R. Civ. P. 78.

II. DISCUSSION

A. Standard of Review

A Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). A district court

must accept any and all reasonable inferences derived from those facts. See Unger v. Nat'l Residents Matching Program, 928 F.2d 1392, 1394-95 (3d Cir. 1991); Glenside West Corp. v. Exxon Co., U.S.A., 761 F. Supp. 1100, 1107 (D.N.J. 1991). Further, the court must view all allegations in the Complaint in the light most favorable to the plaintiff. See Scheuer, 416 U.S. at 236; Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). Finally, in deciding a motion to dismiss, a court should look to the face of the complaint and decide whether, taking all of the allegations of fact as true and construing them in a light most favorable to the nonmovant, plaintiff's allegations state a legal claim. Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990).

B. The Flynn Defendants' Motion to Dismiss Counts 22 - 26 of Plaintiff's FAC

The Flynn Defendants seek two forms of relief in their motion to dismiss. First, the Flynn Defendants seek to dismiss all claims in the FAC against Brian Flynn, in his personal capacity. Second, the Flynn Defendants seek to dismiss Plaintiff's claims of breach of contract (Count 22), breach of fiduciary duty (Count 24) and tortious interference with economic advantage (Count 26) against Flynn, Flynn Appraisal or both Flynn Defendants.

1. Plaintiff's Claims Against Brian Flynn in his Personal Capacity (FAC Counts 22-26)

The Flynn Defendants first argue that all claims in the FAC against Brian Flynn in his personal capacity must be dismissed under Rule 12(b)(6), Fed. R. Civ. P. because Plaintiff has failed to plead facts necessary to hold Flynn liable. According to the Flynn Defendants, at all relevant times, Brian Flynn acted on behalf of Flynn Appraisal. (Flynn's Br. to Dismiss the FAC at 6.) The Flynn Defendants argue that, in order for Plaintiff to hold Brian Flynn personally liable for any conduct he engaged in while acting on behalf of his employer Flynn Appraisal, Plaintiff must state a claim for "piercing the corporate veil" and/or under the "participation theory." (Id. at 6-7.) Because Plaintiff has failed to plead facts necessary to state such a claim, according to the Flynn Defendants, Plaintiff's claim against Flynn in his individual capacity must be dismissed. (Id. at 7.)

a. Piercing the Corporate Veil

The Flynn Defendants point out that a corporation is separate from its shareholders, and that "a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprises." (Id. at 6 citing Catsouphes v. ATEX Assoc., Inc., 287 N.J. Super. 459 (App. Div. 1996).) In order to state a cognizable claim for piercing the corporate veil, a plaintiff must show that: (1) the corporation is organized and operated as a mere instrumentality of a

shareholder, (2) the shareholder uses the corporation to commit fraud, injustice or circumvent the law, and (3) the shareholder fails to maintain the corporate identity. (Id. citing Bd. of Tr. of Teamsters Local 863 Pension Fund v. Foodtown, Inc., 296 F.3d 164, 171-72 (3d Cir. 2002.)) The Flynn Defendants argue that Plaintiff has failed to plead any of the requisite elements to pierce the corporate veil in its FAC. Instead, the Flynn Defendants argue that, on all occasions giving rise to the litigation, Flynn was working on behalf of Flynn Appraisal and as such, no claims against Brian Flynn personally can proceed.

This Court disagrees with the Flynn Defendants' interpretation of the requirements for piercing the corporate veil. Of central importance here is that Plaintiff's claims against Brian Flynn (and Flynn's liability) arise from Flynn's own conduct related to providing the appraisal, and not from Flynn's position as a principal or owner of Flynn Appraisal. As such, Brian Flynn may not use the fact that his allegedly tortious conduct was performed on behalf of a corporate entity to shield himself from liability for his own acts. New Jersey law is clear that an individual who personally participates in a tort may be held individually liable for that tortious conduct even if that individual does so on behalf of his employer. Ballinger v. Delaware River Port Auth., 172 N.J. 586, 608 (2002); Borecki v. Easter Int'l Mgm't Corp., 694 F. Supp. 47, 59 (D.N.J. 1988)(an

agent is liable for his tortious acts, even if his principal is also liable); Moss v. Jones, 93 N.J. Super. 179 (App. Div. 1966). According to the New Jersey Supreme Court, such a conclusion "comports with the long-standing rule that '[a]n agent who does an act otherwise a tort is not relieved from liability but for the fact that he acted at the command of the principal or on account of the principal." Ballinger, 172 N.J. at 608 (citing Restatement (Second) of Agency § 343 (1958)(emphasis added)).

In Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978), the Third Circuit Court of Appeals addressed the exact argument advanced by the Flynn Defendants. In Donsco, the plaintiff brought an unfair competition action against Casper Corporation and its officer Casper Pinsker, individually. Id. The Third Circuit held that:

> A corporate officer is individually liable for the torts he personally commits and cannot shield himself behind a corporation when he is an actual participant in the tort. The fact that an officer is acting for a corporation also may make the corporation vicariously or secondarily liable under the doctrine of respondeat superior; it does not however relieve the individual of his responsibility.

Id. (internal citations omitted); see also United States ex rel. Haskins v. Omega Inst., 11 F. Supp. 2d 555, 565 (D.N.J. 1998). The Court held that because Pinsker authorized and approved the acts of unfair competition that were the basis of Casper Corporation's liability, Pinsker engaged in "sufficient actual participation in the wrongful acts to make [him] individually

liable." Id. The fact that these acts were done by Pinsker as agent of the corporation "does not affect Pinker's liability." Id. Rather, Pinsker was "liable as a participant in the wrongful act . . . [and such] liability is distinct from the liability resulting from the 'piercing of the corporate veil' as that term is commonly used" because "Pinsker is liable here as an actor rather than as an owner." Id.

In this case, Plaintiff's FAC brings causes of action against both Flynn Appraisal and Brian Flynn in his personal capacity. The allegations against Brian Flynn are not based on his position as a principal or officer of Flynn Appraisal, but based on his own personal conduct. This is clear in the FAC where Plaintiff alleges, for example, that Brian Flynn himself breached the contract with Plaintiff (Count 22, ¶ 3) and was negligent in performing the appraisal. (Count 23, ¶ 3). Allegations such as "Flynn Appraisal, by and through Brian Flynn, prepared and issued an appraisal predicated upon false, fraudulent and inflated assessments of value" provide support for Plaintiff's allegations of the vicarious liability of Flynn Appraisal; they do not permit Brian Flynn to avoid personal liability by hiding behind Flynn Appraisal. Thus, Plaintiff need not plead a cause of action for piercing the corporate veil to hold Brian Flynn individually liable in tort. Plaintiff would only need to plead facts related to veil piercing if, for

example, Plaintiff sought to hold Brian Flynn personally liable as owner or officer of Flynn Appraisal for actions of another appraiser's work on behalf of Flynn Appraisal or an action deemed taken by the corporation.

b. Participation Theory

The Flynn Defendants also argue that, under the participation theory, a corporate officer can be held personally liable for a tort committed by the corporation only when he or she is sufficiently involved in the commission of the tort. (Flynn Def.'s Br. at 7 citing Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 303 (N.J. 2002)). Moreover, according to the Flynn Defendants, a plaintiff cannot plead a cause of action sounding in tort without demonstrating that Defendant owed a duty to the plaintiff outside the scope of any contractual relationship between the parties. (Id. at 8.) Without such a duty, the Flynn Defendants argue that the aggrieved party's claim sounds in contract. (Id.) Here, according to the Flynn Defendants, Plaintiff's claims sound in contract, not in tort as the Flynn Defendants had no independent duty arising from the scope of the contract. (Id.)

"[T]he essence of the participation theory is that a corporate officer can be held personally liable for a tort committed by the corporation when he or she is sufficiently involved in the commission of the tort." Saltiel, 170 N.J. at

303. "A predicate to liability is a finding that the corporation owed a duty of care to the victim, the duty was delegated to the officer and the officer breached the duty of care by his own conduct." Id. In Saltiel, the New Jersey Supreme Court addressed the issue of whether corporate officers can be held personally liable for allegedly tortious conduct under the participation theory of liability. Id. at 297. The defendants in Saltiel were two corporate entities and two individuals contracted to design turfgrass for two athletic fields. Id. at 300. The court specifically addressed whether the two officers of the turfgrass corporation could be held personally liable to a plaintiff when the corporation negligently designed turfgrass specifications for the two athletic fields. Id. at 300-01.

The court held that, under limited circumstances the participation theory was applicable to hold corporate officers personally liable for tortious conduct, but because the court was "convinced that [the plaintiff in this case] ha[d] not pled and supported a cause of action sounding in tort, and ha[d] failed to establish that either [individual defendants] owed a duty to plaintiff outside the scope of the contract, the theory cannot be applied to the facts in this record." Id. at 315. Instead, the court held that the "case is essentially a basic breach of contract case" and "[t]here appears to have been no expectation that the individual defendants would be personally liable under

the contract." Id. at 316. Moreover, the court stated that "[u]nder New Jersey law, a tort remedy does not rise from a contractual relationship unless the breaching party owes an independent duty imposed by law" and that in this transaction the court was unable to discern any duty owed to plaintiff "independent of the duties that arose under the contract." Id. The court contrasted the situation to that of a physician, attorney or insurance broker whose duties can be enforced separately and apart from contractual duties. Id.

Here, Plaintiff need not rely on the participation theory to hold Brian Flynn liable because Plaintiff's claims are made against Brian Flynn directly due to his own tortious conduct. It is clear that Plaintiff may bring a claim against Brian Flynn sounding in tort rather than contract. A tort remedy arises here because, unlike the defendant in Saltiel, Brian Flynn was an appraiser who owed a duty to Plaintiff imposed by law and independent from any contractual duty. See Vision Mortgage Corp., Inc. v. Chiapperini, 156 N.J. 580, 586 (1999)(real estate appraiser can be sued for professional malpractice). Moreover, Plaintiff's tort claims are made directly against Brian Flynn based on his actions -- not against a corporate defendant with the intent that Brian Flynn will be held liable through the participation theory of liability. Plaintiff need not use the participation theory to hold Brian Flynn personally liable. As

such, this Court will deny the Flynn Defendants' motion to dismiss Plaintiff's causes of action in Counts 22 through 26 of the FAC against Brian Flynn in his personal capacity.

2. Plaintiff's Additional Claims Against the Flynn Defendants (Counts 22, 24, and 26 of the FAC)

a. Plaintiff's Breach of Contract Claim

The Flynn Defendants argue that Count 22 of the FAC fails to state a claim for breach of contract because Plaintiff has failed to assert how the Flynn Defendants' alleged nonperformance actually caused Plaintiff's injuries. According to the Flynn Defendants, their loss stems from the Redevelopment Defendants' default in payment of the loan, not from an inaccurate appraisal report. Therefore, Plaintiff's claim for breach of contract should be dismissed.

This Court disagrees. The FAC contains numerous allegations that outline Plaintiff's theory of the Flynn Defendants' liability. First, Plaintiff alleges that the Redevelopment Defendants state that they are not liable for the loan because certain loan documents were forged under a fraudulent scheme carried out, in part, by Flynn Appraisal. (FAC ¶ 20.) Plaintiff also alleges that the Flynn Defendants "prepared and issued an appraisal predicated upon false, fraudulent and inflated assessments of value", (id. ¶ 35), and that the Flynn Defendants "breached their contract with Plaintiff by providing an inaccurate, erroneous and inflated appraisal of the fair market

value of the [Coliseum and] [a]s a proximate result of such breach by [Flynn Appraisal], Plaintiff has been damaged." (FAC, Count 22 ¶ 2-3.) These allegations are sufficient to put the Flynn Defendants on notice that, should Plaintiff be unable to recover under the loan due to a fraudulent scheme in which the Flynn Defendants participated, the Flynn Defendants would have caused Plaintiff's damages.

b. Plaintiff's Claim of Breach of Fiduciary Duty

The Flynn Defendants' objection to Plaintiff's claim of a breach of fiduciary duty on the part of Flynn -- specifically that Plaintiff failed to allege a relationship upon which the law imposes a fiduciary relationship -- is equally dubious. Under New Jersey law, a fiduciary relationship exists when "one party places trust and confidence in another who is in a dominant or superior position," F.G. v. MacDonell, 150 N.J. 550, 563 (1997), and where one party "is under a duty to act or give advice for the benefit of another on matters within the scope of their relationship." Id. at 563. The parties have not cited and this Court's research has not found any case recognizing a fiduciary relationship between a mortgage company and an appraiser under New Jersey law. However, New Jersey law makes clear (and the Flynn Defendants admit in their brief) that determining whether a fiduciary relationship exists between two parties is a fact sensitive inquiry. Id. at 563-64 (citing Bogert, Trusts and

Trustees 2d § 481 (1978) (in which the New Jersey Supreme court states "[t]he exact limits of the term 'fiduciary relation' are impossible of statement [and that the finding of such a relationship depends] upon the circumstances of the particular case or transaction, certain business, public or social relationships may or may not create or involve a fiduciary character.") It would appear that Plaintiff can, with discovery, prove some set of facts in support of its claim that a fiduciary relationship exists, was breached and, therefore, that they are entitled to relief. As such, at this stage in the proceedings, the Flynn Defendants' motion to dismiss Count 24 will be denied.[4]

c. Plaintiff's Claim of Tortious Interference with a Prospective Economic Advantage (FAC ¶ 26.)

Finally, the Flynn Defendants argue that this Court should dismiss Count 26, which is titled "tortious interference with prospective economic advantage." (FAC ¶ 26.) Specifically, the Flynn Defendants argue that Plaintiff has failed to state a claim for tortious interference because it failed to plead (1) that actions of the Flynn Defendants caused Plaintiff's alleged harm or (2) that either of the Flynn Defendants acted with malice --

[4] At the completion of discovery, however, the Flynn Defendants can of course bring a motion for summary judgment with respect to this claim arguing that there is no genuine issue of material fact in dispute and that Plaintiff is not entitled to recover for breach of fiduciary duty.

both of which are essential elements of a tortious interference claim.[5]

Plaintiff counters, arguing that Count 26 was inadvertently incorrectly titled "tortious interference with prospective economic advantage." Instead, Plaintiff claims, Count 26 states a claim for negligent interference of prospective economic advantage. Such a claim, according to Plaintiff, is recognized by New Jersey courts. See People Exp. Airlines, Inc. v Consolidated Rail Corp., 100 N.J. 246, 263 (1983).[6] According to Plaintiff, the FAC states such a claim and "regardless of the improper heading of [Count 26], this count should not be dismissed as [P]laintiff has set forth a cause of action against defendants for negligently causing economic loss to [P]laintiff." (Pl.'s Opp. Br. at 16-17.)

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[5] In order to establish a prima facie case of tortious interference with prospective economic advantage, a plaintiff must show (a) a reasonable expectation of economic advantage, (2) interference done intentionally and with malice, (3) causal connection between the interference and the loss or prospective gain, and (4) actual damages. Varallo v. Hammond, Inc., 94 F.3d 842, 848 (3d Cir. 1996).

[6] According to Plaintiff, to bring a claim of negligent interference with prospective economic advantage a plaintiff must show that (1) the defendant knows or has reason to know that a class of people is likely to suffer irreparable harm as a result of the defendant's conduct; (2) the conduct is liable to cause economic damages; and (3) defendant has breached its duty to take reasonable measures to avoid the risk of causing economic damages. Id.

A close inspection of Count 26 of the FAC reveals that the Flynn Defendants' conclusion that Plaintiff was bringing a claim of tortious interference rather than negligent interference was not simply based on Count 26 being inadvertently mistitled as a tortious interference claim. Indeed, paragraph 2 of Count 26 claims that the Flynn Defendants "engaged in conduct that tortiously interfered with Plaintiff's prospective economic advantage." (FAC Count 26 ¶ 2.)

In the next paragraph, however, Plaintiff avers that the Flynn Defendants "made false statements of fact or opinion and were negligent in making such false statements of fact or opinion . . . ." (Id. ¶ 3.) Thus, viewing the allegations in the FAC in the light most favorable to Plaintiff (as this Court must at this stage in the proceedings), while Count 26 of the FAC is less than artfully drafted, it satisfies the minimum requirements of a pleading under Rule 8, Fed. R. Civ. P. as it contains a "short and plain statement[] of 'the grounds upon which the court's jurisdiction depends' and 'the claim showing that the pleader is entitled to relief.'" Blount v. Hunterdon Dev. Ctr., No. 06-5471, 2006 U.S. Dist. LEXIS 88695 (D.N.J. Dec. 6, 2006)(quoting Fed. R. Civ. P. 8(a)). Plaintiff's reference to the Flynn Defendants' negligence in providing the appraisal and how such conduct harmed Plaintiff is sufficient to give "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley

v. Gibson, 355 U.S. 41, 47 (1957). Thus, the Flynn Defendants' motion to dismiss Count 26 of the FAC will be denied.[7]

C. The Flynn Defendants' Motion to Dismiss the Redevelopment Defendants' Claims in the FAA

In their motion directed at the First Amended Answer and cross-claims filed by the Redevelopment Defendants, the Flynn Defendants seek to dismiss the Redevelopment Defendants' claims of negligent misrepresentation and negligence/malpractice (Counts 4 and 5 of the FAA). The Flynn Defendants seek dismissal on the same grounds as they sought to strike Brian Flynn as a defendant in their motion to dismiss certain counts of the FAC, i.e., that the Redevelopment Defendants have failed to allege facts necessary to state a claim for piercing the corporate veil or under the participation theory.

For the same reasons discussed in Section II.B.1(a) and (b) supra, the Flynn Defendants' motion to dismiss the Redevelopment Defendants third-party complaint must be denied. In short, because the Redevelopment Defendants claim that Brian Flynn is liable for various tortious conduct due to his own conduct related to providing the appraisal -- rather than solely as a

[7] However, because Plaintiff admits that Count 26 of the FAC was inartfully drafted, the Court will grant Plaintiff leave to amend the FAC to correct these errors by filing an amended FAC within five (5) days of the entry of this Order. Because the Flynn Defendants have yet to answer the FAC, the Flynn Defendants do not need an opportunity to amend any answer to the FAC.

principal or owner of Flynn Appraisal -- the Redevelopment Defendants need not plead facts related to the doctrine of piercing the corporate veil or the participation theory in order to hold Brian Flynn liable in his individual capacity. As discussed supra, the Flynn Defendants' argument misuses the doctrine of piercing the corporate veil and the participation theory in an attempt to shield Brian Flynn from liability for his own acts. Under New Jersey law, an individual who personally participates in a tort may be held individually liable, Ballinger, 172 N.J. at 608, and "cannot shield himself behind a corporation when he is an actual participant in the tort." Donsco, Inc., 587 F.2d at 606.

In this case, the FAA brings causes of action against both Flynn Appraisal and Brian Flynn individually. The allegations against Brian Flynn are not based on his position as a principal or officer of Flynn Appraisal, but on his personal conduct. Moreover, the Redevelopment Defendants point out that in Flynn Appraisal's answers to interrogatories, the Flynn Defendants admit that Brian Flynn was the only member of Flynn Appraisal to work on the appraisal. (Flynn Appraisal Interrogatory Answers, No. 9.) As such, because the Redevelopment Defendants need not plead a cause of action for piercing the corporate veil or under the participation theory to hold Brian Flynn individually liable, the Flynn Defendants' motion to dismiss will be denied.

III. CONCLUSION

For the reasons expressed above, the Flynn Defendants' (1) motion to dismiss Counts 22-26 of Plaintiff's FAC and (2) motion to dismiss Counts 4 and 5 of the Redevelopment Defendants' FAA will be denied. The accompanying Order will be entered.

December 12, 2006
DATE

s/ Jerome B. Simandle
JEROME B. SIMANDLE
United States District Judge